IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

PATRICK REENERS, an individual, on Behalf of himself and all similarly Situated individuals,	)	**Case No. 3:11cv00573**
Plaintiff,	)	**Judge Campbell**
vs.	)	**Magistrate Judge Knowles**
VERIZON COMMUNICATIONS, INC., et al.	)	**JURY DEMAND**
Defendants.	)	

PLAINTIFF'S MEMORANDUM IN SUPPORT OF HIS MOTION TO DENY WITHOUT PREJUDICE OR DEFER RULING ON DEFENDANTS' MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS

Plaintiff respectfully submits this Memorandum of Law in Support of his Motion to Deny without Prejudice or Defer Ruling on Defendants' Motion to Compel Arbitration and to Stay Proceedings.

INTRODUCTION

On June 22, 2011, Defendants Cellco Partnership d/b/a Verizon Wireless, Verizon Communications, Inc., Vodafone Group Plc, Alltel Communications, LLC, Verizon Wireless (VAW) LLC, and Verizon Wireless Services, LLC, filed Defendants' Motion to Compel Arbitration and to Stay Proceedings ("Arbitration Motion").

As stated in Plaintiff's Limited Response in Opposition to Defendants' Arbitration Motion, being filed contemporaneously with this motion, there are at least two independent bases upon which this court can deny the Arbitration Motion. First, the Court can deny the Arbitration Motion by finding that Plaintiff has complied with the terms of the Customer Agreement because he filed his claim in small claims court and this proceeding is merely the extension of the appellate process provided under Tennessee law.

Second, the Court can deny the Arbitration Motion by finding that the arbitration agreement itself is unenforceable for one or more reasons. In order to deny the Arbitration Motion on this basis, Plaintiff bears the burden of rebutting the presumption of arbitrability. Plaintiff, however, cannot fully and completely present the necessary evidence to rebut the presumption of arbitrability without the aid of limited arbitration-related discovery.

On making this filing, however, Plaintiff has not had an opportunity to conduct any arbitration-related discovery and, therefore, is stymied in his effort to present a full evidentiary record upon which the Court may base its denial of the Arbitration Motion.

ARGUMENT

Plaintiffs should be allowed to conduct arbitration-related discovery prior to a ruling on Defendants' Motion to Compel Arbitration

Under established precedent, state contract law controls the determination as to whether the parties have entered into a valid, enforceable arbitration agreement. *E.g., First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944 (1995) (holding that courts should apply state law principles governing formation of contracts when deciding whether parties have agreed to arbitrate); *Brown v. Green Tree Servs.*, 585 F. Supp. 2d 770, 775 (D.S.C. 2008). "Thus, generally applicable state-law contract defenses like fraud, forgery, duress, mistake, lack of consideration or mutual obligation, or unconscionability, may invalidate arbitration agreements." *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 377 (6^{th} Cir. 2005) (*quoting Cooper v. MRM Investment Co.*, 367 F.3d 493, 498 (6^{th} Cir. 2004)). The defendants have moved the Court to compel arbitration and to stay proceedings in this matter, and in turn have asked the Court to rule on the enforceability of their arbitration provisions without the benefit of a fully developed factual record as required by applicable state and federal law. Justice would not be served if Defendants' Arbitration Motion was allowed to be resolved based on the pleadings alone, as the plaintiff would not be able to present complete rebuttals to the defendants' assertions due to an under-established factual record. See *Granite Rock Co. v. International Brotherhood of Teamsters*, 130 S. Ct. 2847, 2856 (2010) ("A court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate that dispute. To satisfy itself that such agreement exists, the court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce."); *Cappuccitti v. DirecTV, Inc.*, 623 F.3d 1118, 1124 (11th Cir. 2010) (finding arbitration enforceability is a fact-intensive question under Georgia law).

Plaintiff has not yet been able to conduct any discovery.[1] Therefore, no substantive, evidentiary record has been established upon which the Court can base its decision and, thus, no reasonable inferences can be drawn therefrom.[2]

Issues like contract formation and unilateral change in terms by Verizon go to the very heart of whether or not the parties even agreed to arbitrate. The need for limited discovery on these issues is amplified by the fact that the Arbitration Motion is supported by the declaration of Ladonna Oropeza [Docket No. 12], a Verizon employee who offers "facts" which are within the exclusive control of Verizon. Plaintiff is entitled to test and challenge the factual assertions offered by Verizon in support of the Arbitration Motion. This includes requesting documents from Verizon supporting the alleged facts upon which Verizon's declarant relies, and deposing her as well. Moreover, Verizon's production of documents and interrogatory responses regarding its arbitration policies and practices in general, and the deposition of its Rule 30(b)(6) designee on such issues, will enable Plaintiff to demonstrate the infirmities in the enforceability of Verizon's arbitration "agreement."

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[1] Plaintiff requested an agreed extension of time to respond to the Arbitration Motion for 90 to 120 days so that he could engage in limited, arbitration-related discovery but Defendants would not agree.

[2] Although the Court may take judicial notice of certain facts, a district court may only take judicial notice of an adjudicative fact that is not subject to reasonable dispute in that it is either "generally known within the territorial jurisdiction" of the court or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *See* Fed. R. Evid. 201.

It is well-established that it is the federal court's duty to decide the issue of validity of an arbitration agreement if the validity of the arbitration agreement is challenged by a party. *See Rent-A-Center, West, Inc. v. Antonio Jackson*, 130 S. Ct. 2772, 2778 (2010) ("If a party challenges the validity under § 2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement under § 4."). There are many issues here, such as unconscionability, mutual assent, and whether the plaintiff made a knowing and voluntary waiver of his rights to a jury trial, which must be addressed to determine whether the arbitration agreement is enforceable. Plaintiff plans to address these issues, among others, in his full response. The need to conduct adequate discovery to formulate a complete and thorough response, however, is essential. Such discovery is routinely granted. *E.g., Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 91-92 (2000); *Blair v. Scott Specialty Gases,* 283 F.3d 595, 608-10 (3d Cir. 2002); *Dun Shipping Ltd.v. Amerada Hess Shipping Corp.*, 234 F. Supp. 2d 291, 294096 (S.D.N.Y. 2002).

As the Third Circuit noted in *Blair*, "[a]lthough discovery is ordinarily not undertaken at such an early stage of a proceeding that is governed by an arbitration agreement, there is language in the Supreme Court's opinion [in *Green Tree*] faulting the claimant for not presenting evidence 'during discovery.'" *Blair*, 283 F.3d at 609. In both *Blair* and *Green Tree*, the plaintiff challenged that validity of the arbitration agreement on the grounds that it was cost prohibitive. *Blair*, 283 F.3d at 609; *Green Tree*, 531 U.S. at 91-92. The Supreme Court's decision affirming an order compelling arbitration in *Green Tree* was based, in part, on the fact that the claimant failed to meet her burden of showing the likelihood that she had to bear prohibitive costs. 531 U.S. at 91-92. In light of that factor, the Third Circuit in *Blair* concluded:

> Without some discovery, albeit limited to the narrow issue of the estimated costs of arbitration and the claimant's ability to pay, it is not clear how a claimant could present information on the costs of arbitration as required by *Green Tree* and how the defendant could meet its burden to rebut the claimant's allegation that she cannot afford to share the cost.

283 F.3d at 609. Furthermore, the Third Circuit noted that:

> [T]he appropriate inquiry is one that evaluates whether the arbitral forum in a particular case is an adequate and accessible substitute to litigation, i.e., a case-by-case analysis that focuses, among other things, upon the claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims.

Id. (relying upon *Bradford*, 283 F.3d at 556). Indeed, Plaintiff intends to serve arbitration-related written discovery no later than Tuesday July 12. Defendants' responses to these discovery requests, coupled with limited follow-up deposition discovery, will establish certain evidence for the Court's consideration. Furthermore, Defendants' responses to this discovery are directly relevant to factors to be considered by the Court on the issues of arbitrability.

CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that the Court deny without prejudice (or defer ruling on) Defendants' Motion to Compel Arbitration and to Stay Proceedings, and grant the plaintiff: (1) until November 11, 2011 to conduct discovery on the facts, circumstances, and documents related to the arbitration agreement that Defendants seek to enforce, and as to whether it is enforceable under general contract law principles; or, (2) in the alternative, if the Court denies this motion, 20 days from the date of the order denying the motion to file a complete response to Defendants' Arbitration Motion.

DATED: July 6, 2011

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document has been served this the 6th day of July, 2011 via the Court's CM/ECF filing system upon the following:

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